No. 11878.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES E. HILL, doing business as Hill Machine Tools,

Appellee.

APPELLEE'S BRIEF.

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To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Comes now George T. Goggin as trustee and appellee in the within bankruptcy, and in reply to the appellant's opening brief, respectfully states as follows:

Statement of the Case.

Because there are important omissions from the statement of facts appearing in the appellant's opening brief, the appellee deems it necessary to include herein a separate statement of the facts involved on this appeal.

By a written agreement dated June 5, 1945, for the sale of real estate [Tr. 96-100] the appellant agreed to sell and

Charles E. Hill agreed to buy a certain parcel of real estate in the city of Redondo Beach, county of Los Angeles, state of California, more particularly described in said agreement, for the sum of $5500.00. Pursuant to the agreement $350 was paid by the vendee upon its execution, and the balance was to be paid in monthly installments of $200 or more on or before the first day of each calendar month.

The following portions of the said agreement are relevant to the questions presented on this appeal:

> "Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the seller. If action be instituted on this contract, buyer to pay such sum as the Court may fix as attorney's fees whether such action progress to judgment or not.
>
> The buyer shall be let into, and have immediate possession of said premises, but the buyer shall make no changes or alterations in or to any of the buildings now on said premises, nor remove any portion thereof, without the consent of the seller therefore, until after the sum of Fifteen Hundred Dollars ($1500.00) has been paid on the principal sum of the purchase price herein specified; and it is agreed that time is the essence of this contract, and in the event of failure to comply with the terms hereof by said buyer, then the seller shall be released from all obligations of law and equity to convey said premises, and the buyer shall forfeit all right thereto and to all money theretofore paid under this contract; but the said seller on receiving full payments, at the time and in the manner above mentioned, agrees to deliver to the said buyer a policy of Title Insurance showing

the title to said property to be vested in the seller, free of incumbrance except as above stated and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale.

It is further agreed that immediately after said Fifteen Hundred Dollars ($1500.00) has been paid on the principal sum due herein, seller agrees to deliver to said buyer, a policy of Title Insurance showing the title to said property to be vested in the seller free of incumbrances except as above stated, or as may be created or suffered by buyer and to execute a good and sufficient deed to the buyer and the buyer agrees to execute to seller a note secured by a trust deed on the premises for the balance due under this contract, payable in installments of Fifty Dollars ($50.00) or more per month, with interest at the rate of 6% per annum.

* * * * * * * *

It is further agreed that any default shall not become effective for thirty days (30) from date of said default.

/s/ Mrs. Jennie Wuchner, Seller,
/s/ Charles E. Hill, Buyer."

In addition to the $350 paid upon the execution of the agreement, the vendee paid the monthly installments of $200 for the months of August and September, 1945. [Tr. 100, 144.] On February 5, 1946, the appellant-vendor mailed the following written notice to the vendee [Tr. 101]:

"To Charles E. Hill:

You will please take notice that the undersigned, Jennie Wuchner, designated as the 'seller' in that certain agreement drawn between the undersigned as

'seller' and Charles E. Hill as 'buyer' on the 5th day of June, 1945, providing for the sale and purchase of real property located in Redondo Beach, County of Los Angeles, State of California, as more particularly described in said agreement, hereby notifies you:

That there having been default in the payment of installments provided for in said agreement on the part of the buyer, the seller hereby exercises the option contained therein and declares the whole amount of principal and interest now due and unpaid under said agreement namely the sum of $4,912.63 due and hereby demands that you pay forthwith to the seller the said sum of $4,912.63, being the principal and interest now due and unpaid.

Dated this 5th day of February, 1946.

/s/ Mrs. Jennie Wuchner."

On February 11, 1946, in reply to the said notice, there was sent to the vendor the following letter [Tr. 115]:

"Dear Mrs. Wuchner:

In accordance with our previous letter to you and in accordance with your demand of February 5, 1946, directed to Mr. Charles E. Hill referring to the purchase agreement between yourself and Charles E. Hill covering the property at 732 North Pacific Avenue in Redondo Beach, more particularly described in the agreement of June 5th, 1945, to which reference is hereby made, we have prepared the instructions for your signature and ask that if you will execute them, and return to us we shall be pleased to order the policy of title insurance from such company as you prefer or if you have no preference we shall order it from the Title Insurance and Trust Company of Los Angeles, forwarding you a copy of the preliminary report.

This is to advise you that there is on deposit at this time the full amount of your demand of $4912.63 subject to the escrow instructions for clear title as therein set forth.

Awaiting your instructions and pleasure."

The letter was signed by H. F. Poyet, president of the Angelus Escrow Service Corporation.

There was transmitted with the above letter escrow instructions in the usual form [Tr. 118-123] which were duly signed as follows:

"Charles E. Hill, by Dora M. Hill, his attorney-in-fact."

and it was stipulated that Dora M. Hill was the appointee under a written and duly executed power of attorney dated November 6, 1945, signed and acknowledged by Charles E. Hill. [Tr. 139-140.] The escrow instructions so signed by the vendee provided that upon receipt from the vendor of a grant deed and a policy of title insurance on the property in question, the escrow holder was to pay the sum of $4,912.63 to the vendor.

The vendor-appellant did not sign the escrow instructions but returned them to the sender on February 14. 1946, with a letter reading as follows [Tr. p. 115]:

"Mr. H. F. Poyet
Attorney at Law
114 Pier Avenue
Hermosa Beach, California

I am returning herewith Escrow Instructions No. 32, in the same condition in which they were received.

Non-compliance with the terms of the contract entered into by Jennie Wuchner and C. E. Hill, cov-

ering sale and purchase of property described in the contract, has caused same to be forfeited and cancelled.

Yours very truly,

/s/ Mrs. Jennie Wuchner."

In the interim on February 8, 1946, the vendor-appellant sent a second notice to Charles E. Hill, providing in part as follows [Tr. p. 109]:

"To Charles E. Hill:

You are hereby notified that by reason of the default by you in the payment of installments provided for in that certain agreement in writing made and entered into on or about the 5th day of June 1945 by and between yourself and the undersigned, Mrs. Jennie Wuchner, providing for the sale and purchase of that real property in the city of Redondo Beach * * *

That the undersigned hereby declares said contract forfeited and cancelled.

Dated this 8th day February, 1946.

Mrs. Jennie Wuchner."

The sum of $4,912.63, which was referred to in the said letter of February 11, 1946, was deposited in a separate, but related escrow opened the same date, the instructions for which (in so far as they are here relevant) read as follows [Tr. 136-137]:

"Referring to the escrow instructions of Charles E. Hill in the above numbered escrow which instructions are made a part of this instruction by reference, we the undersigned hand you the sum of $4912.63 which you are to use when you can comply with the

foregoing instructions of Charles E. Hill purchasing the property therein described free of liens or encumbrances as therein set forth and in addition thereto you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill his wife to Frank Bruno and Teddy Berg to the above described property you will have the title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg * * *

/s/ Frank Bruno
/s/ Teddy Berg.

I, Charles E. Hill, agree to execute the deed in accordance with the foregoing instructions and agree to comply therewith.

Charles E. Hill,
By /s/ Dora M. Hill,
His Attorney in Fact."

Charles E. Hill, the vendee under the aforementioned contract to sell, went into possession of the property upon the date of execution of the contract and remained in possession at all times thereafter [Tr. 82, 153], and the vendor-appellant was not in possession of the property at any time after June 5, 1945. [Tr. 83, 153.]

On February 19, 1946, the vendor-appellant filed an action in the Superior Court in and for the County of Los Angeles, State of California, seeking to quiet the vendor's title to the property in question, and to foreclose and forfeit all rights of the vendee in and to the said property, the money theretofore paid, and the contract of sale. The defendants to said action were Charles E. Hill and his wife. The defendants were served with a copy of the summons and complaint, but by stipulation

between the parties to the action no answer was filed and no further proceedings were had therein. [Ref. Finding No. 6, Tr. 40, which was and is not now disputed by appellant.]

On February 27, 1946, an action was filed by Charles E. Hill and his wife in the Superior Court of the State of California, in and for the County of Los Angeles, against the appellant herein, seeking declaratory relief to the extent that the said agreement should not be declared forfeited, and also seeking damages against the appellant vendor. In this action a demurrer was filed, and after certain hearings the defendant therein, who is the appellant herein filed an answer, and no further proceedings were had in said action. [Tr. 40.]

On April 5, 1946, an involuntary petition in bankruptcy was filed against said Charles E. Hill [Tr. 2-5], the vendee in the aforesaid agreement, and in said bankruptcy proceeding he was duly adjudicated a bankrupt [Tr. 8]; George T. Goggin, appellee herein, was thereafter appointed Trustee in Bankruptcy of the estate of said Charles E. Hill.

On June 10, 1946, the said trustee-appellee filed in the bankruptcy court a petition for an order to show cause against the vendor-appellant, requiring her to appear and show cause why an order should not be entered decreeing the aforesaid agreement of sale to be in full force and effect. An order to show cause was issued on the said petition and an answer thereto was filed by the appellant.

On June 28, 1946, the appellee tendered to appellant the sum of $5,035.43 representing the entire unpaid balance, together with interest to that date under the aforesaid

agreement to sell. [Tr. 102.] On July 1, 1946, the appellant, in writing, rejected the aforesaid tender, the appellant contending that the aforesaid agreement for the sale of real estate had been forfeited and cancelled. [Tr. 105.]

On July 3, 1946, with leave of court, an amended petition was filed concerning the same matter, by the trustee, and an order to show cause issued thereon to which the appellant filed her answer. [Tr. 10, 11.] This amended petition and the order to show cause thereon constitute the trustee's pleadings herein.

The appellant objected to the jurisdiction of the bankruptcy court to determine the controversy, and the jurisdictional objection was overruled. After several hearings the Referee made his Findings of Fact [Tr. 36], and conclusions of law [Tr. 42] and based thereon entered an order [Tr. 44] by the terms of which the appellee was declared to be the owner of the property in question, free and clear of any claims of appellant, and the appellant was ordered to make and deliver a grant deed to appellee upon the payment to appellant by appellee of the balance of the unpaid purchase price, together with interest. The appellant was also required to supply the trustee with a policy of title insurance pursuant to the terms of the written agreement. The appellant petitioned the District Court for a review of said order [Tr. 46-60] and the petition was denied. [Tr. 62.][1] This appeal followed.

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[1]In denying the petition for review the District Court made a minor modification in the findings of fact. The order of the referee was also modified by striking the provisions stating that the trustee was the owner of the real property in question and substituting therefor the statement that the trustee "is entitled to a conveyance of the real property described." [Tr. 62, 63.]

Summary of Argument.

There are two questions presented on this appeal: Did the bankrupcy court have jurisdiction in a summary proceeding to determine the title to the real property in question?[2] If the answer to the first question be in the affirmative, the remaining issue is whether the Referee and the District Court correctly construed the facts and the law of the State of California in holding that the appellee was entitled to a conveyance of the property in question.

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[2]While the authorities hereinafter discussed conclusively support the rulings of the referee and the District Court on the jurisdictional question, it should be noted that the appellant, through her counsel, seemingly consented to the jurisdiction of the bankruptcy court when he stated to the referee in open court upon the hearing of the petition on the order to show cause:

> "All I want to say is this, whether this matter is to be tried here or in the State Court, all we want is our day in court.
>
> "I might state very frankly the reason I am taking the position of not wanting to enter into any stipulations in this matter, with reference either to admitting jurisdiction of this Court or taking away any performed rights so far as my client is concerned, is this: Whatever Your Honor should rule—and I make those very points, furthermore, as to jurisdiction—whether it is in this department or whether it is in the State Court, I shall abide by that and be willing to try out the issues, either here or in the State Court. . . ." [Tr. 79.]
>
> "And when Your Honor has ruled on the question of jurisdiction and given us our day in court, whether it is here or whether it is in the State Court, we will be willing to proceed." [Tr. 80.]

The Bankruptcy Act specifically provides that jurisdiction may be conferred by consent. Bankruptcy Act, Section 23(b) (11 U. S. C., Chapter 4, Sec. 46b). See also:

2 Collier on Bankruptcy, 14th Ed., 508;

Matter of Prokop (C. C. A. 7th, 1933), 65 F. (2d) 628;

MacDonald v. Plymouth County Trust Co. (1932), 286 U. S. 263;

Harris v. Brundage Co. (1938), 305 U. S. 160.

The authorities hereinafter referred to demonstrate that the Referee and the District Court were correct in answering both questions in the affirmative. The rulings below should be affirmed on the following grounds:

1. The bankruptcy court had jurisdiction in a summary proceeding to determine the title to the real property in question because the bankrupt was in possession of the property upon the filing of the petition in bankruptcy.

2. Pursuant to the terms of the written agreement and by operation of law, the appellee was entitled to a conveyance of the property in question.

a. Upon default of the vendee in paying the installments when due, the appellant was put to an election of remedies, and a binding election was made by demanding the balance of the purchase price.

b. All past defaults of the vendee were waived by appellant.

c. The vendee made a valid tender of the purchase price, and thereby became the owner of the property.

d. The vendor having wrongfully rejected the tender, no further tender was necessary by the vendee.

e. The vendor having refused to accept performance before the offer thereof, no actual tender was required of the vendee.

The Bankruptcy Court Had Jurisdiction in a Summary Proceeding to Determine the Title to the Real Property in Question Because the Bankrupt Was in Possession of the Property Upon the Filing of the Petition in Bankruptcy.

At the time of the filing of the petition in bankruptcy the bankrupt was in actual possession of the real property in question. [Tr. 82, 83, 153.]

The cases hereinafter referred to demonstrate conclusively that all that is necessary to give the bankruptcy court jurisdiction is the possession—either actual or constructive—of the property in question by the bankrupt at the time of filing the petition in bankruptcy. If that fact is established, the bankruptcy court has jurisdiction to determine the rights of any parties in and to such property. While the appellant does not deny the possession of the bankrupt at the time the petition was filed, the untenable contention is made that the possession of the bankrupt was not "legal possession."

This Court had occasion to consider a similar contention in the case of *Schultz v. England* (C. C. A. 9th, 1939), 106 F. (2d) 764, involving the question of title to certain fixtures and equipment, as between the lessor of the premises in which the fixtures and equipment were located and the trustee in bankruptcy for the lessee. At the time of the filing of the petition in bankruptcy, the lessee-bankrupt had been in possession of the premises, but the lessor contended that the lease was terminated by operation of law upon the filing of the petition in bankruptcy and the fixtures and equipment thereby became a part of the realty, the lessor contending that "there was neither lawful possession nor leasehold in-

terest which the bankrupt could pass to the trustee," which seems to be the point made by the appellant in the instant case. This court held that the bankruptcy court had exclusive jurisdiction to determine title to the fixtures and answered the contention as to "lawful possession" by saying (106 F. (2d) at 767): "This argument assumes to answer the very question involved."

With a single exception[3] the cases cited by appellant on pages 49 to 53 of her brief wherein the appellant sets forth her argument on the jurisdictional question, are not in point. These decisions deal with the merits of the controversy between the vendee and vendor under installment contracts; none is concerned with the question of jurisdiction. Clearly a decision on the merits of the controversy is necessarily based upon a holding that there is jurisdiction in the court to determine the controversy. The numerous decisions of the California courts cited by appellant do not mention the question of the jurisdiction of a court of bankruptcy.

The cases of *Federal Farm Mortgage Corp. v. Davis* (C. C. A. 9th, 1942), 132 F. (2d) 663,[4] and *Starr King School for the Ministry v. Kinne* (C. C. A. 9th, 1944), 146 F. (2d) 8, Cert. den. 325 U. S. 850[5] both involved a situation where vendors under installment contracts for the sale of land voluntarily appeared in the bankruptcy proceeding and moved to strike from a schedule of assets the land involved in the installment contract, on the ground

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[3]*In re Logan* (D. C. N. Y., 1912), 196 Fed. 678, referred to in appellant's opening brief at page 53. See *infra* note 6.

[4]Cited on page 51 of appellant's opening brief.

[5]Cited on page 52 of appellant's opening brief.

that the bankrupt's interest therein had been forfeited prior to the bankruptcy. No jurisdictional question was or could have been involved, for the reason that the vendors in both cases had voluntarily consented to the jurisdiction of the bankruptcy court by appearing therein and making their motion.

In the *Federal Farm Mortgage Corporation* case, *supra,* this Court refers to its earlier decision in the case of *Neeley v. Gunning* (C. C. A. 9th, 1941), 124 F. (2d) 7, where this Court had occasion to express itself on the jurisdiction of a court of bankruptcy to adjudicate rights under installment contracts for the sale of real estate as between the vendor and the bankrupt vendee, which is the identical question before the Court on this appeal. The Court states, at 124 F. (2d) 8:

> "The bankruptcy court, by reason of the fact that the farm debtors have possession of the real and personal property covered by the contract has exclusive jurisdiction to determine the rights of the parties therein. Bankruptcy Act. §75, subs. (n), (o) (2), 11 U. S. C. A., §203, subs. (n), (o) (2), *supra*; *Ex parte* Baldwin, 291 U. S. 610, 615, 616, 54 S. Ct. 551, 78 L. Ed. 1020; Thompson v. Magnolia Co., 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876. Section 75, sub. (n), *supra*, of the Bankruptcy Act expressly provides that contracts for purchase, or conditional sales contracts, shall be under the exclusive jurisdiction of the bankruptcy court. Bankruptcy Act, §75, sub. (n), 11 U. S. C. A., §203, sub. (n), *supra.*"

The case of *In re Logan* (D. C. N. Y., 1912), 196 Fed. 678, cited by appellant on page 53 of her brief, does

involve a question of jurisdiction of the Bankruptcy Court, which the court answered affirmatively. The two short sentences quoted by appellant from that decision, however, do not reflect the principle announced by the court in that case. The language quoted by appellant takes on a wholly different meaning when considered in the context of the portion of the opinion in which it is contained.[6]

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[6]". . . under the decisions of the Circuit Courts of Appeal and the Supreme Court of the United States, the test of jurisdiction to proceed in a summary way or by a summary proceeding to determine controversies in regard to real or personal property is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication. *Of course, mere possession is not enough. The finding must be and the facts must warrant the finding that the bankrupt was the true owner, and that he held as owner.* Jurisdiction to proceed in this manner is not defeated by a claim of ownership made by a third person asserted for the first time after a petition in bankruptcy is filed, even though the groundwork for such a claim had been prepared beforehand. Should a bankrupt make, execute and deliver a formal bill of sale of personal property to another, retaining possession of the property, and agree with such person that he should hold title for the bankrupt until the termination of bankruptcy proceedings, the paper title thus held would be merely colorable, and it seems to me that a summary proceeding would be proper, even though both bankrupt and such vendee should claim that the bankrupt's possession was as agent or bailee of the person holding the bill of sale. I do not see that it makes any difference that the property in question is real estate and not personal property, and that the transfer of title is a deed, and not a bill of sale. Under such circumstances, it cannot be material that the deed was executed and delivered and recorded more than four months prior to the bankruptcy, nor can it be material that the deed of the property came from another party, the bankrupt paying the consideration therefor and the transaction being one intended to cover and conceal the bankrupt's property from creditors and the trustee in bankruptcy when appointed. It cannot be that a plenary suit in such case is necessary in order to reach the property. The property comes at once within the jurisdiction of the bankruptcy court and constructively into its possession, it being in possession of the bankrupt himself, and no claim adverse to the bankrupt having been made prior to the institution of the bankruptcy proceedings." (196 Fed. at 688.) (Italics ours, representing portion quoted by appellant. See page 53, appellant's opening brief.)

The cases are legion to the effect that the governing test to be applied in determining whether a court of bankruptcy has jurisdiction in a summary proceeding to determine rights and interests with respect to property is whether or not there was possession by the bankrupt—either actual or constructive—at the time of the filing of the petition in bankruptcy. The cases on this point are so numerous that we shall only refer to controlling decisions of the United States Supreme Court, and decisions of this Court.

A Supreme Court decision which is particularly in point on the question of jurisdiction here involved is *Ex parte Baldwin* (1934), 291 U. S. 610, where Mr. Justice Brandeis, speaking for the Court, states at page 615:

> "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian v. Central Trust Co.*, 93 U. S. 93, 112; compare *Riehl v. Margolies,* 279 U. S. 218, 223;

Straton v. New, 283 U. S. 318. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. *Murphy v. Hoffman Co.,* 211 U. S. 562, 569. In bankruptcy, this rule applies regardless of whether the property is located in the district in which bankruptcy proceeding originated. The injunction to protect its possession may issue either from the court of original jurisdiction, or from the federal court for the district in which the state court suit is brought or in which the plaintiff in that suit resides. *Isaacs v. Hobbs Tie & Timber Co.,* 282 U. S. 734, 737-8.

"But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare *Chicago Board of Trade v. Johnson,* 264 U. S. 1, 11; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426, 433. *The jurisdiction extends also to the adjudication of questions respecting title. White v. Schloerb,* 178 U. S. 542; *In re Eppstein,* 156 F. 42. Compare *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 54; *Security Mortgage Co. v. Powers,* 278 U. S. 149, 153." (Emphasis added.)

These principles have been repeatedly restated by the Supreme Court in such cases as:

Taubel-Scott-Kitzmiller Co. v. Fox (1924), 264 U. S. 426.[7]

Thompson v. Magnolia Petroleum Co. (1940), 309 U. S. 478;[8]

Cline v. Kaplan (1944), 323 U. S. 97;[9]

Gardner v. New Jersey (1947), 329 U. S. 565.[10]

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[7]"By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either §67-e, or §60-b, or §70-e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from the custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court.

Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60 and under subdivision e of §70." 264 U. S. at page 432.

[8]"Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. . . . the jurisdiction thus acquired by the bankruptcy court 'extends . . . to the adjudication of questions respecting the title.' (*Ex Parte Baldwin*, 291 U. S. 610, 616." 309 U. S. at page 481.

[9]"A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 481." 323 U. S. at 98.

[10]"That jurisdiction is not limited to the prevention of interference with the use of property by the trustee; it 'extends also to the adjudication of questions respecting the title.'" 329 U. S. at 577.

That actual or constructive possession by the bankrupt at the time of the commencement of the bankruptcy proceedings is the sole test applied in determining the jurisdiction of the bankruptcy court has been announced in numerous decisions of this Court:[11]

Heffron v. Western Loan & Bldg. Co. (C. C. A. 9th, 1936), 84 F. (2d) 301;

City of Long Beach v. Metcalf (C. C. A. 9th, 1939), 103 F. (2d) 483;

Schultz v. England (C. C. A. 9th, 1939), 106 F. (2d) 764;

Neeley v. Gunning (C. C. A. 9th, 1941), 124 F. (2d) 7;

Bank of California v. McBride (C. C. A. 9th, 1943), 132 F. (2d) 769.

In closing the discussion of the jurisdictional question, we should like to refer to the statement of this Court in its decision in the *City of Long Beach v. Metcalf,* 103 F. (2d) at 486, where the rule is clearly and distinctly stated as follows:

> "Appellee's petition alleges that at the date of the filing of the petition in bankruptcy, the property in question was owned by, and was in possession of, the bankrupt. If so, the filing of the petition in bankruptcy brought the property into the custody of the

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[11]See also the learned opinion of Judge Jenney in the case of *In the Matter of American Fidelity Corporation* (D. C. Cal., 1939), 28 F. Supp. 462 at page 467.

bankruptcy court (Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307, 32 S. Ct. 96, 56 L. Ed. 208; Hebert v. Crawford, 228 U. S. 204, 208, 33 S. Ct. 484, 57 L. Ed. 800; Lazarus v. Prentice, 234 U. S. 263, 266, 34 S. Ct. 851, 58 L. Ed. 1305; Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 649, 36 S. Ct. 466, 60 L. Ed. 841; *Ex parte* Baldwin, 291 U. S. 610, 615, 54 S. Ct. 551, 78 L. Ed. 1020), and, upon adjudication, title to the property, with actual or constructive possession, vested in appellee—the bankruptcy court's trustee—as of the date of the filing of the petition in bankruptcy. Mueller v. Nugent, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405; Fairbanks Steam Shovel Co. v. Wills, *supra;* Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645.

"Thereafter, notwithstanding section 23, *supra,* the bankruptcy court, having possession of the property, had jurisdiction to hear and determine all questions respecting title thereto. Murphy v. John Hofman Co., 211 U. S. 562, 568, 29 S. Ct. 154, 53 L. Ed. 327; Hebert v. Crawford, *supra;* Board of Trade v. Johnson, 264 U. S. 1, 11, 44 S. Ct. 232, 68 L. Ed. 533; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 432, 44 S. Ct. 396, 68 L. Ed. 770; Isaacs v. Hobbs Tie & Timber Co., *supra; Ex parte* Baldwin, *supra.* Whether such possession was actual or constructive is immaterial. Constructive possession was sufficient. Taubel-Scott-Kitzmiller Co. v. Fox, *supra.* We hold, therefore, that the bankruptcy court had jurisdiction of this proceeding."

At the close of its opinion the court appropriately refers to the allegation of the bankrupt's possession as the "jurisdictional allegation."[12]

On the basis of the undisputed fact that the property in question was in the physical possession of the bankrupt at the time the petition in bankruptcy was filed, the authorities conclusively support the ruling of the Referee and the District Court that there was jurisdiction in the bankruptcy court to determine the rights of the parties to the property in question.

Pursuant to the Terms of the Written Agreement and by Operation of Law, the Appellee Was Entitled to a Conveyance of the Property in Question.

The controversy between the parties on the merits can be completely resolved by a consideration of the admitted facts without any apparent necessity for a determination of the disputed facts. The written contract between the appellant and the bankrupt contained the following clauses:

> "Should default be made in payment of any installment when due, the whole sum of principal and interest shall become immediately due *at the option of the seller.*" (Emphasis added.) [Tr. 98.]

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[12]"Appellants may, in their answer, deny any or all of appellee's allegations, including the jurisdictional allegation that the bankrupt was in possession of the property at the date of the filing of the petition in bankruptcy. Such denial, if made, will place on appellee the burden of proving the challenged allegations.

"If the jurisdictional allegation is proved by appellee or (hereafter) admitted by appellants, the referee should, and we assume that he will, then proceed to hear and determine the other issues raised by the petition and answer. If the jurisdictional allegation is not proved or admitted, the referee should, without considering any other issue, dismiss the proceeding." 103 F. (2d) at 487.

"Time is the essence of this contract, and in the event of failure to comply with the terms hereof by said buyer, then the seller shall be released from all obligations of law and equity to convey said premises, and the buyer shall forfeit all right thereto and to all monies theretofore paid under this contract." [Tr. 98.]

"Any default shall not become effective for 30 days from date of said default." [Tr. 100.]

The vendee under this contract had been in default for several months, and on or about February 5, 1946, the vendor sent the vendee a written notice whereby the vendor "exercises the option contained" in the contract and declared "the whole amount of principal and interest now due and unpaid" to be $4912.63 and demanded said sum forthwith. By a written reply dated February 11, 1946, the vendee enclosed escrow instructions duly signed by him informing the vendor that there was deposited in escrow, for the vendor, the sum demanded in said notice. On February 8, 1946, appellant sent a written notice to the bankrupt declaring "said contract forfeited and cancelled."

The authorities hereinafter discussed demonstrate that the first notice dated February 5th, whereby the appellant demanded the sum of $4912.63 was pursuant to the express provisions of the contract and constituted a binding election, thereby making the purported declaration of forfeiture of February 8th a complete nullity.

At the outset appellee desires to make clear that he does not question the rule of *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, and the cases cited by appellant following

the *Glock* case.[13] As will be shown, the *Glock* case itself is authority in support of the rulings of the Referee and the District Court.

(a) Upon Default of the Vendee in Paying the Installments When Due, the Appellant Was Put to an Election of Remedies, and a Binding Election Was Made by Demanding the Balance of the Purchase Price.

In the *Glock* case the California Supreme Court refers to the rights of the vendor under a contract sued as that here involved, as follows (123 Cal. at p. 10):

> "Upon the other hand, after the vendee's breach of the covenant to pay, what are the vendor's rights? 1. To stand upon the terms of his contract and sue

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[13]There is a line of cases in the State of California allowing relief to the vendee from a forfeiture under the provisions of Section 3275 of the Civil Code of the State of California, seemingly ignoring the principle of the *Glock* case which did not mention this code section.

MacDonald v. Kingsbury (1911), 16 Cal. App. 244, 116 Pac. 380;

Troughton v. Eakle (1922), 58 Cal. App. 161, 208 Pac. 161;

Fickbohm v. Knaust (1930), 103 Cal. App. 443, 284 Pac. 692;

Ebbert v. Mercantile Trust Co. (1931), 213 Cal. 496, 2 P. (2d) 776.

For a thorough discussion of the development and status of the rule of *Glock v. Howard,* see NOTE: 27 Cal. L. R. 583.

The California State Legislature has codified the policy of giving relief from attempted forfeitures in the following Civil Code sections:

> "§1442. FORFEITURES STRICTLY CONSTRUED. — A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."
>
> "§3275. FROM FORFEITURE.—Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of grossly negligent, willful, or fraudulent breach of duty."

> for its breach under section 3307 of the Civil Code; 2. Still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee; so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; 3. Going into equity, still upon his contract, he may seek specific performance; or finally, if his generosity prompts him so to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money."

This statement has been construed by the California courts as putting the vendor to an election of remedies. For example, in the case of *Security-First National Bank v. Hauer* (1941), 47 Cal. App. (2d) 302, the court states at page 306:

> "Upon the breach of any covenant by the vendees under a conditional sales agreement, plaintiffs are entitled to invoke either of two remedies: (1) To affirm the contract and sue for the balance of the purchase price, or (2) to terminate the contract, retain the money paid on the purchase price and repossess the property. (Glock v. Howard & Wilson C. Co., 123 Cal. 1 (55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199).) These remedies are inconsistent, and the election of one precludes the right to exercise the other. The vendor is not entitled to pursue both by declaring a forfeiture, retaining possession of the movable property described in the sales agreement together with cash payment already made, and by collecting future payments under the contract."

Similarly in the instant case the appellant's notice to the vendee demanding the balance of the purchase price constituted an election to affirm the contract, which is wholly inconsistent with the attempted declaration of forfeiture purportedly invoked by the second notice.

While the contract involved in this case contained express provisions providing for the election of remedies, the established law of the State of California with respect to conditional sales contracts shows that there is an election of remedies even though the contract is silent on the subject.[14]

(b) All Past Defaults of the Vendee Were Waived by Appellant.

The strict forfeiture rule laid down in *Glock v. Howard, supra,* has led the California courts to adopt a liberal rule of waiver. Thus, in *Boone v. Templeman* (1910), 158 Cal. 290, 110 Pac. 947, there was involved an installment contract for the sale of land in which time was expressly made of the essence. The court states (158 Cal. at 295):

> "These authorities make it clear that the acceptance of payment of installments on the price . . ., without objection long after they had become due, was a waiver of all the breaches which had occurred at or prior to the time such payments were actually

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[14]*Holt Mfg. Co. v. Ewing* (1895), 109 Cal. 353;
Johnson v. Kaeser (1924), 196 Cal. 686, 239 Pac. 324;
Covington v. Lewis (1927), 83 Cal. App. 8, 256 Pac. 277;
Cocores v. Assimopoulos (1932), 127 Cal. App. 360, 15 P. (2d) 892;
Smith v. Miller (1935), 5 Cal. App. (2d) 651, 43 P. (2d) 347;
James v. Allen (1937), 23 Cal. App. (2d) 205, 15 P. (2d) 810.

> made, and that he [the vendor] could not afterwards insist upon a forfeiture on account thereof . . . as to these breaches the forfeiture was waived."

This statement represents the settled law of California.[15]

While in the instant case there was no acceptance by the vendor of late payments, there was a demand by the vendor of the entire balance due under the contract in the notice of February 5, 1946. Clearly this was an express waiver of all past defaults.

The opinion in the case of *Boone v. Templeman* sets forth another ground which constitutes strong authority in support of the holding of the Referee and the District Court that the appellant had waived all defaults prior to the giving of the notice of February 5th. It is undisputed in the instant case that the vendee, notwithstanding his failure to pay the installments when due, continued in the undisturbed possession of the property for a period of approximately seven months during which six installments became due, but which were not paid. With respect to similar facts in *Boone v. Templeman,* the California Supreme Court stated (158 Cal. at 296):

> "After the acceptance of the last sum paid, twenty-four additional payments of principal and interest fell due and were not paid, Boone [vendee] remaining in possession and Templeman [vendor] apparently acquiescing in the continuance of the contract, giving no notice to the contrary, not doing anything inconsistent therewith for still another period of four-

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[15] *Hayt v. Bentel* (1913), 164 Cal. 680, 130 Pac. 432; *Hoppin v. Munsey* (1921), 185 Cal. 678, 198 Pac. 398; *Beck v. Swank* (1921), 55 Cal. App. 552, 203 Pac. 1010; See Note (1924), 12 Calif. L. Rev. 438, 440.

> teen months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time and that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold."

It follows, on the authority of *Boone v. Templeman,* that the appellant had waived the defaults occurring prior to the giving of the notice of February 5, and the waiver having been complete, the attempt to rely on the defaults in the notice of forfeiture given February 8, was of no avail.

(c) The Vendee Made a Valid Tender of the Purchase Price, and Thereby Became the Owner of the Property.

The appellant argues that the tender was insufficient for the reason that as a condition to receiving the money demanded the appellant was required to tender a deed and a policy of title insurance. A reading of the contract between the parties reveals that the vendor therein was obligated to deliver to the vendee "a policy of title insurance showing the title to said property to be vested in the seller free of incumbrance . . . and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale." [Tr. 98.] The law of California on this question is clear. If the vendor demands the entire purchase price, the delivery of a deed and the payment of the balance of the purchase price become concurrent conditions. *Boone v. Templeman, supra,* is also the leading case in California on this question. There the principle is succinctly stated as follows (158 Cal. at 297):

> "Where in a contract for the sale of land the price is made payable in installments at different times and

the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, non-payment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment. (McCroskey v. Ladd, 96 Cal. 459 (31 Pac. 558); Russ v. Muscupiabe etc. Co., 120 Cal. 526, (65 Am. St. Rep. 186, 52 Pac. 995); Glock v. Howard, 123 Cal. 18 (69 Am. St. Rep. 17, 55 Pac. 713); Underwood v. Tew, 7 Wash. 297 (34 Pac. 1100); Malaby v. Kuns, 3 Ind. 398; Gorham v. Reeves, 3 Ind. 83; McCulloch v. Dawson, 1 Ind. 419; Cunningham v. Gwinn, 4 Blackf. (Ind.) 343, and cases cited in McCroskey v. Ladd, *supra.*"

This rule has been consistently followed by the California Courts.[16]

The other condition in the escrow instructions signed by the vendee which is now objected to by the appellant concerns the length of time the escrow was to remain open. Appellant contends that the escrow instructions required that the escrow remain open until May 6, 1946, thus deferring the payment of the money until that date. An

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[16]*Hayt v. Bentel* (1913), 164 Cal. 680, 130 Pac. 432;
Lemle v. Barry (1919), 181 Cal. 6, 183 Pac. 148;
Kerr v. Reed (1921), 187 Cal. 409, 202 Pac. 142;
Bank of America v. Ries (1932), 128 Cal. App. 75, 16 P. (2d) 1018);
McCartney v. Campbell (1932), 216 Cal. 715, 16 P. (2d) 729;
Lifton v. Harshman (1947), 80 Cal. App. (2d) 422, 182 P. (2d) 222;
Hunt v. Mahoney (1947), 82 A. C. A. 598.

examination of the escrow instructions shows no reference whatsoever to a May 6th date. The instructions do state that the escrow is to remain open until May 1, 1946, and that the escrow holder is to pay over the money to the appellant *"on or before"* said date upon receipt from appellant of a grant deed and policy of title insurance.

Although the authorities above mentioned conclusively establish that the vendee's tender was a valid and proper one, had there been any defects in the tender, they would have been waived. There is nothing in the record to show that the appellant made any objection whatsoever to the tender, other than to state that the contract had been terminated. The objections which appellant now makes to the tender are made for the first time on this appeal.[17] The law on this question has been codified in California. Section 1501 of the Civil Code of the State of California provides as follows:

> "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

Section 2076 of the Code of Civil Procedure of the State of California provides as follows:

> "The person to whom a tender is made must, at the time, specify any objection he may have to the

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[17]Likewise appellant in her opening brief raises for the first time a claim for attorney's fees, and for this reason appellee does not deem it necessary to make any reply thereto. No such claim was made by appellant either in her answer to the petition on the order to show cause filed with the Referee [Tr. 22], in her objections to the findings of fact and conclusions of law of the Referee [Tr. 27], in the petition for review by the District Court [Tr. 46], or in her specification of the points to be relied upon on appeal [Tr. 161].

money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward."[18]

Having tendered the amount demanded by the vendor-appellant to which tender the appellant made no objection, the vendee thereby became the owner of the property in question. This principle was announced by the California Supreme Court in the case of *Walker v. Houston* (1932), 215 Cal. 742, 12 P. (2d) 952. In that case an action was brought to foreclose a chattel mortgage. The defendants had purchased certain furniture on conditional contracts of sale and had executed a chattel mortgage to plaintiffs, which chattel mortgage covered the same furniture. The chattel mortgage was executed before the defendants had paid the purchase price called for by the installment contract of sale, but the chattel mortgage provided that it was only of the "equitable interest" of the mortgagors. Thereafter the defendants delivered the furniture to the warehouse of the conditional seller, although the defendants were not then in default under the contract. Subsequently, the defendants made a valid tender

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[18]These code sections have been given full effect by the California courts.

Duncan v. Standard Accident Ins. Co. (1934), 1 Cal. (2d) 381, 390, 35 P. (2d) 523;

Backus v. Sessions (1941), 17 Cal. (2d) 380, 389, 110 P. (2d) 51;

Beeler v. American Trust Co. (1944), 24 Cal. (2d) 1, 28, 147 P. (2d) 585;

Smiley v. Read (1912), 163 Cal. 644, 126 Pac. 486;

Julian v. Gold (1931), 214 Cal. 74, 80, 3 P. (2d) 1009;

Hossom v. City of Long Beach (1948), 83 A. C. A. 966, 189 P. (2d) 787.

to the vendor under the conditional sales contract, which was refused. The Court states the following with respect to the effect of the tender made by the vendees (215 Cal. at 746):

> "In our opinion, there is no doubt that the title of the conditional seller is an 'incident' of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. It is true that the cases previously cited deal with liens. Nevertheless, the title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of this obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held. (Davies-Overland Co. v. Blenkiron, 71 Cal. App. 690 (236 Pac. 179); Dame v. C. H. Hanson & Co., 212 Mass. 124 (Ann. Cas. 1913C, 329, 40 L. R. A. (N. S.) 873, 98 N. E. 589); National Cash Register Co. v. Wapples, 52 Wash. 657 (101 Pac. 227).)"

This principle has been followed by the California Courts in analogous cases involving real estate.[19]

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[19] *Sondel v. Arnold* (1934), 2 Cal. (2d) 87, 39 P. (2d) 793;
Wagner v. Shoemaker (1938), 29 Cal. App. (2d) 654, 85 P. (2d) 229;
Brooks v. Fidelity Savings & Loan Assn. (1942), 54 Cal. App. (2d) 130, 128 P. (2d) 711;
Hossom v. City of Long Beach (1948), 83 A. C. A. 966, 189 P. (2d) 787.

(d) The Vendor Having Wrongfully Rejected the Tender, No Further Tender Was Necessary by the Vendee.

The present readiness and willingness of the appellee to pay the balance due, upon a sufficient tender being made by the appellant, is demonstrated by the check for all moneys due, with interest, which was sent to appellant by the appellee. [Tr. 102.] Upon rejection of the check by appellant the said check has been filed with the Bankruptcy Court. [Tr. 62.] However, after appellant rejected the tender originally made by the vendee, no further tender was necessary, the appellant having indicated that any further tender would be refused. A tender need not be kept open when it appears that it will not be accepted.[20]

(e) The Vendor Having Refused to Accept Performance Before the Offer Thereof, No Actual Tender Was Required of the Vendee.

After the appellant's notice of February 8, 1946, attempting to declare a forfeiture, the appellant has consistently maintained the alleged right of forfeiture and has continued to reject binding offers of performance by the bankrupt and the appellee. The appellant has therefore clearly placed herself within the scope of Section 1515

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[20]*Hoppin v. Munsey* (1921), 185 Cal. 678, 198 Pac. 398;
Bogue v. Roeth (1929), 98 Cal. App. 257, 276 Pac. 1071;
Ratterree Land Co. v. Security-First Nat'l Bank (1938), 26 Cal. App. (2d) 652, 80 P. (2d) 102;
Wagner v. Shoemaker (1938), 29 Cal. App. (2d) 654, 85 P. (2d) 229;
Hossom v. City of Long Beach (1948), 83 A. C. A. 966, 189 P. (2d) 787.

of the Civil Code of the State of California, reading as follows:

> "§1515. Refusal Before Offer—Retraction. —A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it."

This fundamental rule of law represents the approach to this problem which was taken by the Referee and the District Judge. The appellant has no equities in her favor, particularly in view of the renewal of the tender made by the bankrupt through the check of the trustee, including full interest to the date of the trustee's tender, and the rejection thereof by the appellant for the apparent reason that she felt that the property might bring a higher price if repossessed by her. Under these circumstances the appellant should not be entitled to retain the monies paid on account by the bankrupt, obtain the return of the real property, and thereby deprive the creditors in the within estate from realizing upon any equity available in the real property. All arguments with reference to proper tender or any offer on the part of the bankrupt or the trustee to comply with the terms of the contract would be completely answered by the application of Civil Code Section 1515, but, as has been hereinbefore demonstrated, this is but one of several grounds sustaining the position of the courts below.

Conclusion.

On the basis of the record in this case, it is clear that the Referee and the Trial Court correctly ruled that there was jurisdiction in the bankruptcy court to adjudicate the rights of the parties to the property in question, and that on the merits it was correctly decided that the appellee herein was entitled to a conveyance of the property.

Wherefore, appellee prays that the order of the District Court affirming the Referee, be affirmed by this Court.

Respectfully submitted,

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